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In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

JAMES E. JONES,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

and

RAILWAY EXPRESS AGENCY, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James E. Jones, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 1, 1950.

I.

OPINIONS BELOW.

Memorandum opinion of the District Court (R. 55). Opinion by the Court of Appeals for the Sixth Circuit (R. 71).

II.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 1, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. Code, § 1254(1).

III.

QUESTION PRESENTED.

Does not the rule stated in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035 rather than the decision in *Wells-Fargo v. Taylor,* 254 U. S. 175, 65 L. Ed. 205, determine whether or not an employee of the present Railway Express Agency is afforded the protection of the Federal Employers' Liability Act?

IV.

STATUTE INVOLVED.

§ 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, as amended by the Act of August 11, 1939; 45 U. S. C. A., Section 51) provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

V.

STATEMENT OF FACTS.

NATURE OF CASE.

This is an action for damages for severe and permanently disabling personal injuries.

It is based upon the Federal Employers' Liability Act. (Title 45, Sec. 51, U. S. C. A.)

The plaintiff was injured while working in the nominal employ of the defendant Railway Express Agency, Inc. (frequently referred to hereafter as the *Express Agency*).

An action was filed in the District Court against *two* defendants, the Express Agency and The New York Central Railroad Company (frequently referred to in this brief as the *Railroad*).

On November 30, 1945, plaintiff was working as an "Express messenger" or freight handler, in a car of a railroad train which was operated by the Railroad from Cleveland, Ohio to St. Louis, Mo. The train was an "Express and Mail Special"; known as New York Central Train No. 2-23.

It was pulled by a locomotive owned by the Railroad.

It consisted of fifteen cars.

Eleven cars were loaded with shipments of that kind of fast freight which is ordinarily called "express" matter.

Seven of the eleven "express" cars were owned by The New York Central Railroad which operated the train.

Two others were owned by the Boston & Albany R. R. Co. One was owned by the Lackawanna R. R. Co., and one was owned by the Southern Pacific R. R. Co.

Of the four other cars in the train, one was a "Frisco" R. R. Co. car which was loaded with empty milk cans which were being shipped on railroad baggage tariffs issued by the Frisco, from Massachusetts to Springfield, Mo.

A second (owned by the New York Central) was loaded with United States Mail.

A third (Car No. REX No. 1501) was owned by the defendant Railway Express Agency, Inc. It was *not* loaded with the so-called "express" matter. Like the preceding car, it was loaded with U. S. Mail.

The fourth (a New York Central car) was a combination passenger and baggage car. There were no passengers and no baggage in the car.

In other words, in this "Express and Mail Special" one car was owned by the Express Agency, and all of the rest by various railroads. And the load hauled in the Express Agency car had nothing to do with the Express Agency business.

All of the freight handlers worked in cars which were owned by the various railroads (seven of the eleven owned by the New York Central). The duties of these freight handlers were to sort and load and unload the shipments of freight at the various stops.

Plaintiff worked as a messenger or freight handler in Boston & Albany R. R. Co. car No. 896.

On this particular trip of this "Express and Mail Special" the train made three routine stops for the discharge of freight shipments in Ohio, at Crestline, Marion and Bellefontaine. It made five routine stops for the discharge of such freight shipments in Indiana, at Union City, Muncie, Anderson, Indianapolis and Greencastle. At the next following stop at Terre Haute, the accident occurred. At this particular stop, and while the train was standing on a track owned by the Railroad, but reserved for the use of its "express" trains, plaintiff was caught and crushed between his railroad car and a motor driven truck, and severely injured.

All of the train stops were made upon tracks of the defendant Railroad.

All of the work done by plaintiff, was performed in helping to sort and to unload "express" freight from the train on which he was employed.

The motor truck by which he was struck, while he was attempting to enter one of the cars at Terre Haute, was owned and operated by the defendant Express Agency which was engaged in helping to unload freight from the train.

It is the basic claim of the plaintiff that he was an employee of both the Express Agency and the Railroad, and entitled to the benefits of the Federal Employers' Liability Act against one or the other or both of the defendants.

HISTORY OF CASE.

A Complaint was filed in the District Court against both defendants in which it was said (R. pp. 2, 3):

> "* * * (2) The defendants are corporations organized and existing pursuant to law and engaged in carrying on the business of interstate commerce by rail.
>
> (3) At all times herein referred to, the plaintiff was regularly engaged in the capacity of an express messenger, and by virtue of his employment his rights and the duties and responsibilities of the defendants were subject to and controlled by the so-called Federal Employers' Liability Act.
>
> (4) On or about the 30th day of November, 1945 * * * the plaintiff was engaged in his regular employment by the defendants * * * when an express truck was backed up by the defendants in such a manner as to strike the plaintiff * * * seriously and permanently injuring him.
>
> (5) Plaintiff says that at the time herein referred to the defendants were reckless and negligent in the following respects, to-wit: etc."

To this Complaint, the defendants filed separate answers; and thereafter they filed a joint Motion for Summary Judgment. (R. 13.)

Evidence was offered in support of, and in opposition to this Motion by way of affidavits, exhibits, and answers to interrogatories.

The trial court after hearing, sustained the Motion for Summary Judgment. The Court's opinion is in the Record (pp. 55, 56); and final judgment was entered in favor of the defendants. (R. 57.)

In substance, the Court held that "whatever this Court's view might be, were it presented for the first time," he regarded the case, so far as the *Express Agency* was concerned, to be controlled by the decision of the Supreme Court of the United States in *Wells-Fargo v. Taylor,* 254 U. S. 175; 65 L. Ed. 205, and that so far as the Railroad was concerned, the plaintiff was not an employee.

On appeal to the Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed (R. 69) and an opinion rendered (R. 71).

VI.

SPECIFICATIONS OF ERROR TO BE URGED.

1. The Court of Appeals for the Sixth Circuit and the District Court for the Northern District of Ohio, Eastern Division, erred in holding that *Wells-Fargo v. Taylor,* 254 U. S. 175, 65 L. Ed. 205 (1920) is controlling in the case at bar.

2. The Court of Appeals for the Sixth Circuit and the District Court for the Northern District of Ohio, Eastern Division, erred in holding that the Railway Express Agency, Inc., is not a common carrier by railroad so as to be liable to its employees under the Federal Employers' Liability Act.

3. The Court of Appeals for the Sixth Circuit and the District Court for the Northern District of Ohio, Eastern Division, erred in holding that when an employee of the Railway Express Agency, Inc., is injured while working on a railroad train he is not entitled to the benefits of the Fed-

eral Employers' Liability Act as an employee of that railroad.

VII.

REASONS FOR GRANTING OF WRIT.

One of the reasons for granting review on a writ of certiorari is found in the Revised Rules of the Supreme Court of the United States. Rule 38, paragraph 5(b) states, "Where a circuit court of appeals * * * has decided a federal question in a way probably in conflict with applicable decisions of this court. * * *"

It is petitioner's position that under the principle of law enunciated in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035 and numerous other decisions by this Court interpreting and applying the Federal Employers' Liability Act, the Court of Appeals for the Sixth Circuit has decided the question in the case at bar in a way which not only is *probably* in conflict with applicable decisions of this Court, but which *is* in obvious and demonstrable conflict.

There are many thousands of *railroad* workers, who are in real fact engaged exclusively in *railroad* employment—for the exclusive benefit of *railroad* companies—who like your petitioner James E. Jones have been and will continue to be denied the protection of the Federal Employers' Liability Act because of a decision which was rendered *thirty* years ago with respect to an "Express Company" and which is now being applied to an "Express Agency" merely because of the similarity of *words*—even though there is no similarity whatever in the actual *facts.*

Your petitioner respectfully submits that the national scope of this problem and the obvious conflict between the *Seibert* case, *supra* and the *Wells-Fargo* case, *supra,* are valid reasons for a review on writ of certiorari.

VIII.

CONCLUSION.

Your petitioner, James E. Jones, respectfully requests the Court to grant his Petition for a Writ of Certiorari to review the judgment entered in this case by the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARVIN C. HARRISON,
HARRISON, THOMAS, SPANGENBERG & HULL,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

JAMES E. JONES,
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NEW YORK CENTRAL RAILROAD COMPANY,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

Memorandum opinion of the District Court (R. 55). Opinion by the United States Court of Appeals for the Sixth Circuit (R. 71).

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 1, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. Code, § 1254(1).

III.

STATEMENT OF FACTS.

The statement of facts is set forth in the foregoing Petition for a Writ of Certiorari.

IV.

SUMMARY OF THE ARGUMENT.

When an express business is taken over separately by one railroad or collectively by all of the railroads as was done in the United States on December 7, 1928, the railroads do not thereafter operate two separate lines of business, one a railroad business and the other an express business; but on the contrary, the express business becomes fundamentally a part of and merged with the railroad business. That was the decision in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035.

The decision in *Wells-Fargo v. Taylor,* 254 U. S. 175, 65 L. Ed. 205, involved an independent, privately owned and separately operated express company. It is *not* dispositive of the case at bar, as the District Court and Court of Appeals for the Sixth Circuit have held. This is true because the present "Express Agency" is a no-profit Company exclusively owned and operated by and for the railroads. It comes squarely under the rule laid down in the *Seibert* case, *supra.*

V.

ARGUMENT.

PART I.

When an express business is taken over by a railroad, the railroad company does not thereafter operate two lines of business, one a railroad and the other an express business; but on the contrary, the express business becomes fundamentally a part of and merged with the railroad business.

This is the principle of law enunciated by the Supreme Court of the United States in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035.

This is the principle of law that plaintiff contends applies to the present relationship between the Railway Express Agency, Inc., and the various railroads.

The distinction for which we are here contending was sharply developed by Judge Caldwell in his opinion in *Pacific Express Co. v. Seibert,* 44 Fed. 310, when that case was in the lower court.

This was a suit to enjoin a Missouri state tax on Express Companies. The plaintiff express company made the argument that the tax was violative of the 14th Amendment and the Equal Protection of the laws since it affected only express companies, as such, and did not attempt to tax railroad corporations which might carry on their own express business.

In denying this claim of the plaintiff, Judge Caldwell pointed out that it was true that in the past some railroads have sometimes carried on the express business directly in exactly the same manner as all of the American Railroads are now doing. In his opinion he quoted (p. 319) from the "first annual report of the Interstate Commerce Commission—1887" as follows:

> "In the first annual report of the Interstate Commerce Commission (1887, p. 13) it is said:
>
> 'Some of the railroad companies, however, have undertaken to do the express business on their own lines,

through their own agencies. The Baltimore & Ohio Railroad Company did this for a time, and then sold the business to one of the existing express companies. **Some of the western railroads combine for the purpose, and for convenience, create a nominal corporation to do the business over their several lines, and divide the net proceeds.** * * * There is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation.' " (Emphasis ours.)

After quoting this portion of the 1887 Interstate Commerce Commission Report, Judge Caldwell continued in his opinion as follows:

> "**When a railroad company, by the addition of a new bureau or department, and the adoption of new methods in the conduct of its business commonly done by an express company, it does not thereby itself become an express company.** Such an expansion or extension of its business as a common carrier works no change in its corporate character. Nor does it escape taxation on such new business." (Emphasis ours.)

In other words, as argued by Judge Caldwell, when an express business is taken over by a railroad, the railroad company does not thereafter operate two lines of business, one a railroad and the other an express business; *but on the contrary, the express business becomes fundamentally a part of and merged with the railroad business,* and there was therefore no impropriety in taxing the railroad only as a railroad.

We have quoted thus at length from Judge Caldwell's statement and argument because of the extraordinary words of approval given his opinion when the case was appealed to and affirmed by the Supreme Court of the United States in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035. The closing sentences of that opinion are as follows:

> "The opinion of the court below on this branch of the case is elaborately argued, and is conclusive. We concur in the reasoning of it as well as in the language

employed, and refer to it as a correct expression of the law upon the subject."

Both the District Court and the Court of Appeals held that *Wells-Fargo v. Taylor,* 254 U. S. 175, 65 L. Ed. 205 (1920) was controlling in the case at bar.

The contrasting facts between those obtaining 30 years ago in the *Wells-Fargo* decision, and those existing today is as follows:

Wells-Fargo Case.	The Present Case.
The Train. A passenger train, with one car used for express.	*The Train.* An "Express and Mail Special" train. No passengers.
The Express Company. A privately owned company. No interest in the railroad; and the railroad having no rights or interest in it.	*The Express Company.* A no-profit company; exclusively owned by and operated for the railroads.
The Revenues. All net profits payable to a private corporation.	*The Revenues.* All net profits paid to the railroads in direct ratio to their share of the business.
The Relationship. A genuinely independent contractor relationship.	*The Relationship.* Claimed to be an agency of the railroads. Actually, since the "agent" has no independent powers or rights, there is an essential identity between the express agency and the railroads.
The Messenger's Employer. A genuine independent corporation. As the Supreme Court said: "The messenger * * * was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed, and paid, and at whose will he was to continue in service or be discharged."	*The Messenger's Employer.* Since the messenger (the plaintiff) was in the employ of the "agent" of the railroads, it would be natural that he could be discharged at the orders of the railroads. This is specifically provided for in the Identical Agreement, Article XII.

We are confident that the *Wells-Fargo* decision—even if correctly decided—is *not* dispositive of our case at bar and that the trial court and the Court of Appeals was in error in assuming that it was.

The essential fallacy in the claim that it decides our case (as we see it) is the assumption that every corporation or agency which has the word "EXPRESS" attached to it is necessarily engaged in a similar business, and that any decision that can be found with respect to an "EXPRESS" company is necessarily controlling with respect to every other company with a similar name, no matter how changed or how diverse the nature of their operations may be.

Before we proceed to elaborate the distinctions between the case at bar and the facts of the *Wells-Fargo* decision, it might be helpful to define the words "express" and "express companies" and paint in briefly their historical background.

PART II.

THE DEFINITIONS AND MEANINGS OF THE WORDS "EXPRESS" AND "EXPRESS COMPANY."

There is no magic about the words *"express"* or *"express company"* which of their own force will show whether a corporation carrying on an *"express"* business is, or is not, within the terms of the Employers' Liability Act.

The vast learning of the *Oxford Dictionary* devotes five and one half columns to the history and to the varied meanings of the word "Express." It says (*inter alia*) with respect to this word (III, 445, 446):

> (b) *Express train.* Originally 'special train'; but about 1845 applied to a train running 'expressly' for the conveyance of passengers to one particular place, and not stopping at the intermediate stations; now, a train running at a high rate of speed, and stopping only at a few important stations. Hence *Express speed.*
>
> (c) *Express rifle*: a rifle constructed to discharge a bullet with a high initial velocity and a low trajectory.
>
> (d) *Express delivery*: (in the Postal service) immediate delivery by special messenger, on a system

introduced in 1891; so, *express fee, messenger, packet,* etc.

* * * * *

And in the *Standard Dictionary,* the meaning of the word is stated thus:

"EXPRESS. 1. A system of transportation (usually for goods of small bulk, as package, trunks, and boxes) by rapid conveyance, generally managed by organized corporations, for use by the public at fixed rates.

2. Any means of rapid conveyance or transmission, regular or occasional; (1) express-train; (2) a courier;

3. A message; dispatch; special communication sent with speed.

"EXPRESS-BUSINESS. A business for the transportation of goods or other chattels by regular route and at specific intervals; distinguished from freight-transportation, as assuring more expeditious service and care.

"EXPRESS-COMPANY. A common carrier that operates a system of transportation.

"EXPRESS-TRAIN. A railway train for conveying passengers and express matter rapidly, operated at high speed and with few stops."

And in the *Encyclopedia Britannica* (11th Ed.), under the heading EXPRESS (Vol. 10, p. 84), the meaning and history is further developed:

"The word is most frequently used with the idea of something done with a definite purpose; the term 'express train' now meaning one that travels at a high speed over long distances with few intermediate stoppages. * * * Similarly in the British postal service, express delivery is a special and immediate delivery of a letter, parcel, &c, by an express messenger at a particular increased rate. The system was adopted in 1891.

In the United States of America, express companies for the rapid transmission of parcels and lug-

gage and light goods generally perform the function of the post office or the railways in the United Kingdom and the continent of Europe. Not only do they deliver goods, but by the cash on delivery system the express companies act as agents both for the purchaser and seller of goods. * * * *The system dates back to 1839 when one William Frederick Harnden (1813-1845), a conductor on the Boston and Worcester railway, undertook on his own account the carrying of small parcels, and the performance of small commissions.* Obliged to leave the company's service or abandon his enterprise, he started an 'express' service between Boston and New York, carrying parcels, executing commissions and collecting drafts and bills. Alvin Adams followed in 1840, also between Boston and New York. From 1840 to 1845 the system was adopted by many others between the more important towns throughout the States. The attempt to carry letters also was stopped by the government as interfering with the post office. In 1854 began the amalgamation of many of the companies. Thus under the name of the Adams Express Company the services started by Harnden and Adams were consolidated. The lines connecting the west and east by Albany, Buffalo and the lakes were consolidated in the American Express Company * * * while another company, Wells, Fargo, & Co., operated on the Pacific coast. The celebrated 'Pony Express' was started in 1860 between San Francisco and St. Joseph, Missouri, the time scheduled being eight days. The service was carried on by relays of horses, with stations 25 miles apart. The charge made for the service was $2.50 per ½ ounce. The completion of the Pacific Telegraph Company line in 1861 was followed by the discontinuance of the regular service." (Emphasis ours.)

It would appear therefore, that the only essential significance of the word "*express*" when attached to the business of carriage, whether of freight or passengers, is to indicate that it is a service which is expedited or especially rapid.

That was obviously the basic significance of the famous "Pony Express."

It was (we think) the meaning when used by the companies which took the names of Wells-Fargo *Express* Company, Adams *Express* Company, and American *Express* Company.

In the limited sense that it also seeks to give a hurry-up service, a rapid and expedited service, the business of the Railway *Express* Agency is undoubtedly similar to the Pony Express, and to all of the other many varieties of Express agencies.

But that (as this brief seeks to show) is about as far as the similarity extends.

AMERICAN EXPRESS COMPANIES—HISTORICAL EVOLUTION FROM FREIGHT FORWARDER TO COMMON CARRIER BY RAILROAD.

A good deal of the history of American Express Companies, and of the legislation relating to them, is given in the opinion by Judge Caldwell in *Pacific Express Co. v. Seibert,* 44 Fed. 310 (1890).

> "From the origin of express companies down to the present time a distinguishing and uniform feature of their method of conducting business has been the hiring of railroad and water transportation for their messengers and freights. *It is a common carrier that does not own any means of transportation,* but hires other common carriers (railroad and steam-boat companies) to carry its freight and messengers. It may be defined to be, a common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight, and also other articles, and packages of any description, which the shipper desires, or the nature of the article requires, should have safe and rapid transit and quick delivery, transporting the same in the immediate charge and custody of its own messenger, on passenger steamers and express and passenger railway trains,

which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights, and within cities and towns or other defined limits it collects from the consignors and delivers to the consignees at their places of business the goods that it carries." (Emphasis ours.)

In their inception, the Express Companies did not "*own any means of transportation*" as the language from the *Seibert* case states.

But the express business under the present regime is not quite so devoid of "means of transportation."

Although it is still true that the railroads (since they are operating their own collective fast freight business through their own collective agency) provide most of the facilities, it still remains true that the Express Agency has purchased some of the railroad cars which it uses and has leased a good many more.

In their answer to Interrogatory No. 58 (R. 27) the defendants say that the Express Agency "owns" 230 of the cars which it uses and has under lease 556 other cars.

And although its "carload" business is only a small part of its huge operations, it remains true that it is operating 780 railroad cars in interstate business as a "common carrier by railroad car"; and that in this comparatively small department, it had an income in 1945 of 31 million dollars. This compares with 385 million dollars which was its gross income for less than carload freight. (These figures from the statistics attached to the Petition of the Express Agency to the I. C. C. June 20, 1946.)

It must be obvious that when Judge Caldwell was giving his definition of an "express company" in the *Seibert* case, he was describing what was (or had been) essentially a "forwarder" or "forwarding company."

The problem of the differences and distinctions between "forwarders," "express companies," and "common carriers," is a problem both in historical development and in semantics. For a careful survey of the problem includ-

ing in particular the problems in semantics which are involved, see leading article on "FREIGHT FORWARDERS AND COMMON CARRIAGE" by Daniel J. Ahearn in 15 *Fordham Law Review* 248 (1946).

Some of the definitions of a "forwarder" or a "forwarding agent" are as follows:

Bouvier's Law Dictionary:

"FORWARDING MERCHANT: A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but one who had no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent. (Citing cases.) He is required to use only ordinary diligence in sending the property by responsible persons."

In re: Emerson Marlow & Co., 119 Fed. 95, 98; 117 C. C. A. 635:

"A 'forwarding merchant' or 'forwarder' is one who ships or sends forward goods for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them and neither includes a consigner shipping goods nor a carrier engaged in transporting them."

Hooper v. Wells-Fargo & Co., 27 Cal. 11, 26; 85 Am. Dec. 211:

"The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. The liability of forwarders is like that of warehousemen and common agents and is governed by the general rule applicable to other bailees for hire, not subject to extraordinary liabilities. They are responsible for ordinary care, skill, and diligence —that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business."

Roberts v. Turner (N. Y.), 12 Johns. 232, 233; 7 Am. Dec. 311:

> "A forwarder of merchandise, who maintains a warehouse for the receipt of goods, and forwards them therefrom by common carriers to such destination as the owners may designate, is not a common carrier, nor liable as such, though he derives a benefit from the carriers of the goods, in receiving case from the owners of the cargoes, and paying the boatmen in goods, and also in charging more than he actually pays."

And in the recent case of *U. S. v. Chicago Heights Trucking Co.*, 310 U. S. 344; 84 L. Ed. 1243, the Supreme Court of the United States gave this definition of the function of forwarders:

> "Forwarders utilize common carriers by rail and motor truck to transport goods owned by others. They solicit and obtain many small shipments, from various points within an area and cause them to be carried in less than truck-load or carload lots to a concentration center within the area. There they are assembled by the forwarder for further transportation in truck-load or carload lots. * * * The forwarder customarily arranged for the pickup, assembly and transportation of the shipments by carriers for hire. And the forwarders, not the owners of the goods, select the carriers and route the shipments."

That (we submit) is pretty much what the "express companies," so-called, have been doing for a good many years. Beginning with the exploits of William F. Harnden, the famous Boston & Worcester Railroad conductor (referred to above), who was certainly a "*forwarder*," but who is generally claimed to have been the first "*express*" man, we see a "forwarding" business growing and evolving until it became the immense "common carrier" business of more recent years.

Eventually (1906) the "express companies" were specifically recognized as "common carriers," and as such

placed under the direct jurisdiction and control of the Interstate Commerce Commission. (Title 49, Sec. 1; U. S. C. A.)

And much more recently (1942) all "freight forwarders" have also been brought by statute under the same control. (Title 49, Chapter 13, Sec. 1001 *et seq.*; U. S. C. A.)

In the light of the facts which have been judicially held to be the essential characteristics of an "express" company, and which were dealt with in the *Wells-Fargo vs. Taylor* decision (*supra*) what are the facts about our "Express Company"—the Railway Express Agency, Inc.,—in the case at bar?

Whatever the nature and the history of the older "express" enterprises may have been, it is clear that in 1928 the railroads of the United States determined to reclaim and recapture all of this "express" business for themselves.

This was accomplished by the device of setting up a brand new corporation which would act as the collective agency for all of them in this collective venture. The facts are as follows:

(1) A new corporation (the Railway Express Agency) was formed.

(2) Stock ownership in the Express Agency was limited to the railroads.

(3) The Express Agency then (on March 1, 1929) concurrently entered into an identical form of agreement with every railroad company in the country.

(4) These Identical Agreements provided that the Express Agency should be the agent or representative of all the railroads in carrying on the fast freight or "express" department of their business.

(5) The Express Agency was so set up that it could neither have profits or losses; but all revenues collected (after the payment of the necessary operating costs) were immediately paid over to the railroads in direct proportion to their share of the business.

PART III.

THE DECISION IN WELLS-FARGO EXPRESS CO. v. TAYLOR DISTINGUISHED.

It must be obvious as we have already pointed out that the express business, in its inception, was essentially a forwarding business.

And so long as it was a forwarding business, there was no valid reason for regarding any particular express company as a common carrier.

But eventually the express companies began to grow beyond the early concept of forwarders. This is obvious from an examination of the many cases that are reported and in which their activities were involved.

And it was equally obvious when eventually, they were thrust under the direction and regulatory powers of the I. C. C.

As of that time, they had ceased to be merely forwarders—and had become essentially common carriers.

But had they become "common carriers *by railroad*"?

The Supreme Court of the United States said NO in the *Wells-Fargo* decision. But that decision was clearly based upon facts which do not now obtain!!

The Court of Appeals for the Sixth Circuit in their opinion said (R. 73), "We find nothing in the record sufficient to differentiate the Express Agency from Wells Fargo & Company or to place it in a separate category."

This is an amazing statement.

The record shows the following to be true.

The Express Company.

Wells-Fargo Case.	The Present Case.
The Express Company. A privately owned company. No interest in the railroad; and the railroad having no rights or interest in it.	*The Express Company*—A no-profit company; exclusively owned and operated for the railroads.

1. A new corporation (Railway Express Agency, Inc.) was formed in 1928.

"The Railway Express Agency, Inc. was incorporated on December 7, 1928 in the State of Delaware." (Answer to Interrogatory No. 1. R. 24)

2. Stock ownership in the Express Agency was limited to the railroads.

It is provided both by the charter of the Express Agency, and by its by-laws that no one is eligible to own a share of stock in it but railroad corporations; and it is provided further that the stock so issued to these railroad corporations can not be transferred to any other person or company, but must be offered back to the Express Agency itself at the price originally paid.

The provisions of the Charter, and of the By-laws are as follows:

THE ARTICLES OF INCORPORATION.

"Fourth: The total number of shares of capital stock authorized is one thousand, which shares are without nominal or par value. Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof.

The holder of any share or shares of stock of the corporation shall not sell, transfer or otherwise dispose of the same * * * without first offering such share or shares to the corporation for purchase at the price at which such shares were issued.

The subscription, purchase or other acquisition and **the holding and ownership of shares of stock of this corporation shall, as far as may be lawful, be limited to railroad corporations.**" (Emphasis ours.)

THE BY-LAWS.

"*Article I, Section 2.* Subject to any limitations prescribed by law **railroad corporations only shall be entitled to subscribe for, purchase or otherwise ac-**

quire and to hold shares of stock of the corporation and the certificates of stock shall so provide.

"*Section 3.* In case the holder of any of the shares of stock of the corporation shall desire to sell, transfer, or otherwise dispose of the same or any part thereof * * * such holder shall offer in writing said shares for sale to the corporation at the price at which said shares were issued by the corporation and upon payment of such price by the corporation shall transfer said shares to the corporation and the certificates of stock shall so provide.

"Upon the transfer of any of said shares of stock to the corporation, each member of the district as described in Section 8 of Article II hereof, of which such seller was a member shall, in case the Board of Directors in its discretion shall so request, contribute towards the amount paid by the corporation for said shares in the proportion that the number of shares of stock of the corporation held by such member bears to the aggregate number of shares of stock of the corporation held by all members of the district and upon such contribution shall be entitled to receive from the corporation its proportionate part of such number of shares of stock so acquired as may be distributed without causing fractional shares." (Emphasis ours.)

3. The Express Agency then (on March 1, 1929) concurrently entered into identical agreements with every railroad company in the country.

There is in evidence a copy of the Identical Agreement which was entered into between the New York Central Railroad Company and the Express Agency. Some portions of this document are printed in the appendix.

The same agreement exactly was entered into between the Express Agency and all of the other railroads. They are all printed in the agreement. This list of 756 railroads includes every railroad in the country.

The opening words of the agreement (pp. 1 and 2 of the Agreement) recite:

"This Agreement, made as of March 1, 1929, between THE NEW YORK CENTRAL RAILROAD COMPANY * * * and the Railway Express Agency, Inc., a corporation * * * hereinafter referred to as the "Express Company"

WITNESSETH:

Whereas, **the Rail Company has united with other carriers** operating railroads in the continental United States **to acquire** through their own express agency the properties of the American Railway Express Company employed in the express business, **and to conduct through such express agency** the future operations of **the express business**; and

Whereas, **the Express Company has been organized as THE JOINT EXPRESS AGENCY or facility of the Rail Company and other carriers uniting as aforesaid,** all of which have undertaken to enter into agreements with the Express Company identical herewith."

4. These Identical Agreements provided that the Express Agency should be the agent or the representative of all the railroads in carrying on their express, or fast freight department.

Not only did each of these Identical Agreements contain the language quoted above, but they also contained other provisions which emphasize and reinforce the same point.

By these Identical Agreements, the railroads united to carry on a joint-express business. In other words, while they continued to operate **separately,** so far as the passenger and mail and heavy freight parts of their business was concerned, the fast freight part of the business was henceforth to be carried on **jointly**, through this new joint agency. Some of the provisions of the Identical Agreement which make this additionally clear are:

"ARTICLE II. Sec. 1. **The Rail Company hereby constitutes and appoints the Express Company ITS EXCLUSIVE AGENT** (a) for the conduct and transaction of the express transportation business * * *

upon such passenger, express or mail trains of the Rail Company as may be agreed to * * * and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement * * *"

* * * * *

"ARTICLE VI. **The Express Company * * * shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business AS AGENT of the Rail Company**; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company."

The Relationship.

Wells-Fargo Case.	**The Present Case.**
The Relationship. A genuinely independent contractor relationship.	*The Relationship.* Claimed to be an agency of the railroads. Actually, since the "agent" has no independent powers or rights, there is an essential identity between the express agency and the railroads.

1. The essential identity of the Express Agency and the Railroads.

The real identity of interest between the Express Agency and the Railroads is illustrated by one provision in the Identical Agreements which requires the Express Agency to make Common Cause with the Railroads when higher rates are desired!!!

"The Express Company hereby agrees from time to time to take or unite with the Rail Company and other interested carriers in taking such action to secure just and reasonable express rates as may at any time become necessary either before the Interstate Commerce Commission or before the several state Commissions, or both." (Identical Agreement, Article XIX, p. 30.)

There is in evidence, a Petition of the Express Agency of March 10, 1947 to the I. C. C. asking for higher rates. And it is conceded (Answer to Supplemental Interrogatory No. 35, R. 37) that the Railroad entered "its appearance with other railroads in support of the application (of the Express Agency) of March 10, 1947."

And when the petitions of the Express Agency to the I. C. C. are examined, it will be noted that they recite as one of the principal reasons why the Express Agency should have higher rates, *the increased operating expenses of the railroads.*

For example, see the following argument in the Petition of The Express Agency of March 10, 1947:

> "Petitioner is informed and believes and therefore alleges that * * * the *railroads* * * * *have incurred very large increases in the costs of transporting Petitioner's express traffic.* The existing rates and charges which were authorized by the Commission do not reflect such increased costs and Petitioner is unable from the revenues accruing to it under such rates and charges adequately to compensate the railroads for handling its express traffic.
>
> The *railroads' current wage rates* are 19.8 percent higher than those prevailing in 1945. * * * In addition vacations with pay granted in connection with the 1941 and 1943 wage increases now *cost the railroads* approximately $75,000,000 annually on the basis of the current level of employment.
>
> Similarly, increases have taken place in the prices of *railroads'* fuel, materials and supplies. * * *
>
> An entirely new and substantial item of expense to the *railroads* is the tax imposed by law on their payroll to finance social security benefits for railroad employees. * * *
>
> Due to these additional items of expense in 1947, the *railroads' 1947 operating costs,* on the basis of the same volume of employment and traffic as in 1946, but at 1947 unit costs will be $322,000,000 in excess of the costs of the same operations at 1946 prices, $1,068,500,-

000 in excess of 1945 costs, and $2,188,000,000 more than at 1940 costs.

By reason of the foregoing * * * it is estimated that the maximum payments which Petitioner can make to the *railroads* for handling its express traffic in 1947 will fall short to the extent of not less than $70,000,000 of providing adequate compensation for the services performed by the *railroads* in transporting Petitioner's express traffic." (Petition of March 10, 1947 of Express Agency to I. C. C., pp. 3-6.) (Emphasis ours.)

This would seem a curious argument *if* there were any real distinction between the Express Agency on the one hand, and the Railroads, on the other.

But when the real situation is kept in mind, the argument is appropriate enough.

Bearing in mind, that although *in name,* it is a Petition *by the Express Agency* for higher rates for the Express Agency, it is *in fact* a Petition *by the Railroads,* for higher rates *for the Railroads,* so that their own collective fast freight department may show a better profit, there was every reason in logic why they should show the increased costs of the Railroads as the reason for higher rates for their own Express Agency.

We have already pointed out the many references in the Identical Agreements by which the Railroads which created the Express Agency refer to it as their "joint express agency or facility"; and their "exclusive agent (a) for the conduct and transaction of the express transportation business"; and by which the Express Company agrees to operate its business "as Agent" of the railroads.

In addition to these references, the language of Article II, Section 1 of the Identical Agreement is interesting:

"* * * All classifications, tariffs and other rules or regulations relating to the transportation of express matter required or permitted to be filed with the I. C. C. or other public body may be filed by the Express Company on its own behalf and/or on behalf of the Rail Company and other carriers with which the

> Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose of filing with the I. C. C. * * * all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter."

It would be difficult to state the identity of the Express Agency with the Railroads in more explicit terms.

There is literally nothing so vital to the enterprise which the Express Agency was attempting to carry on, as these "classifications, tariffs and other rules or regulations relating to the transportation of express matter," and yet with respect to them the Railroads gave to the Express Agency a complete proxy to act for them and it.

The real truth (we should think) is that with respect to the one department of fast freight, the Express Agency was merely another name for the railroads; and the railroads merely another name for the Express Agency.

This is *not* in any real sense a case of principal and agent. That relationship presupposes a real, existing agent. But what genuine, separate existence does the Express Agency have?

It is owned by railroads, and the stock can not be transferred to nor owned by anybody but railroads.

More important however, it can not have any profits, and it can not have any losses, but all net income to the very last penny, must go back into the treasury of the railroads over whose lines the fast freight is hauled. There is nothing paid to any railroad because it owns some of the stock of the Express Agency. *All net revenues* are paid to those railroads that carry the express over their rails, in direct ratio to the amount carried; and that amount so paid has no relationship whatever to the amount of stock in the Express Agency.

If it be conceded that the older "Express Companies" were "common carriers" but *not* "common carriers *by*

railroad," surely it must be admitted that these "Express Companies" *could* merge their limited business with the general business of the railroads, so that the express is carried on as a part of the business of "common carrier by railroads."

We urge that the facts of this case show that this is exactly what has happened, and that therefore the plaintiff while working for the Express Agency was in the employ of a "common carrier by railroad."

2. Admissions in proceedings before The Interstate Commerce Commission and in judicial proceedings.

On this point it is the plaintiff's contention that by its own acts and representations and conduct, in various hearings before The Interstate Commerce Commission, and in judicial proceedings the Express Agency has made it plain that it is a "Common carrier by railroad."

Ever since July 29, 1906, the term "common carrier" as defined in The Interstate Commerce Act (Title 49, Sec. 1, U. S. C. A.) has specifically included "express companies" and they have been under the supervision and jurisdiction of the I. C. C.

The Express Agency is compelled, therefore, to seek the authority of the I. C. C. for permission to raise any of its tariffs, or to change any of its classifications. This is true to the same extent as if it were a railroad, or the railroad were the Express Company.

By either name, it is engaged in the "transportation" of property "between the States" as a "common carrier."

There are in evidence several of the formal petitions and briefs which were filed by the Express Agency with the Interstate Commerce Commission in support of its efforts to get higher express rates.

In our first major point above, we called attention to the fact that in some of the petitions, the Express Agency had disclosed its essential identity with the Railroads by

citing the increased costs to the Railroads, as a valid reason for higher rates for the Express Agency.

We now wish to call attention to some further statements in these same petitions, as showing admissions that the Express Agency is a "common carrier by railroad."

For example in a Supplemental Petition filed with the I. C. C. on March 10, 1947 it said:

> "**Your Petitioner** (the Express Agency) **is an express company engaged as a common carrier in the transportation of express shipments of property throughout the country, by railroad,** by water, by highway and by air. Incident to the conduct of its business as such common carrier it employs the facilities of other carriers, primarily and preponderantly of carriers by railroad." (Emphasis ours.)

It would be difficult to put in more explicit language the statement that it is a "common carrier by railroad."

In order that this statement may be fully understood, we find in one of its tables of statistics the following breakdown of its employees, and its earnings, which also shows that it is a "common carrier by railroad."

This table is attached to its petition filed with the I. C. C. on June 20, 1946. The figures given are for the year 1945.

Total number of employees:	79,044
Total earnings for express services:	$429,787,001.89
Earnings for *railroad* services:	416,290,472.47

The fact that this immense amount of business as a "common carrier by railroad" is interstate in character is shown by the same Petition (p. 9) where it is stated:

> "It is estimated that the average weight of l.c.l. (i.e., less than carload) express shipments today is slightly in excess of fifty pounds and that *the average haul is now around 500 miles.*"

Surely it is a matter of judicial notice, that an "average haul" of "500 miles" must of necessity mean that most of the business is interstate in character.

Furthermore in *judicial proceedings* the Express Agency has sometimes made admissions which are of interest. For example the essential identity of the Express Agency with the Railroads is relied on by both the Express Agency and the Railroads when it suits their purpose to assert it.

Thus for example in *Aetna Ins. Co. v. Railway Express Agency et al.*, 48 Ohio Law Abstract 324, a limitation of liability which was incorporated in an Express Agency receipt for property was successfully relied on to defeat an action against the railroad whose negligence caused destruction of the property. In the course of its opinion the Court of Appeals for the First Ohio District said (p. 346):

> "It seems clear therefore that the 'handling' of the shipment by the employers of the (Express) Agency was a 'handling by the railroads, through the employers of their duly constituted agent.' "

And when it suits its purpose, the Express Agency expressly concedes and asserts that it is a "common carrier by railroad" and that its employees are subject to the Federal Employers' Liability Act.

Thus, for example, in *Railway Express Agency, Inc. v. Britton* (Okla.-1935) (43 P. 2d 119), the same Express Agency which is a party in our case at bar was sued jointly with the railroad company over which the express business was being done, by a man who was acting both as the "Express Messenger" in the employ of the Express Agency, and as conductor for the railroad. He was injured while attempting to unload express matter, and sought to recover under the state law. *Both* defendants claimed that his rights arose as to *both* of them, under the Employers' Liability Act, and that he was barred from recovery by reason of the assumption of the risk. In the opinion, the Supreme Court of Oklahoma said:

"Plaintiff was unloading the express shipments at the Healdton station * * * and * * * caught one of his feet in a loose string or cord attached to one of the other express packages on the floor * * * The defendants, in their answer, and at the trial, contended that plaintiff was engaged in interstate commerce, so that the action was governed by the Federal Employers' Liability Act; that plaintiff assumed the risk of an injury involved in this action under said Employers' Liability Act. * * *

The plaintiffs in error urge two propositions of law, viz:

Proposition 1. The true rule is that a Master must exercise ordinary and reasonable care to provide a place of safety for its employees to work but is not an insurer of the safety of its employees.

Proposition 2. The plaintiff was engaged in interstate commerce at the time of his injury, and the rights and duties of the parties are governed by the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59) as construed by the federal courts. Under the Federal Employers' Liability Act, the plaintiff assumed the risk of injury from a hazard such as is involved in this case. * * *

Since this case must be reversed for the reason assigned above, we do not consider it necessary to pass on the legal question involved in Proposition two. * * *"

During the preparation of our brief, there has come to our attention an official government publication which is *not* in evidence but which as a government publication of an official government board, we suppose this Court can properly consider.

It is entitled: REPORT TO THE PRESIDENT by the EMERGENCY BOARD, Appointed April 9, 1949 by Executive Order 10050 Pursuant to Section 10, of the Railway Labor Act.

Its subtitle is:

"To investigate the facts as to a dispute between the Railway Express Agency, Inc., a carrier, and certain of its employees represented by the Brotherhood

of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NMB Case A-3006

Washington, D. C.; May 6, 1949.
No. 73."

In this Report, we find some statements that are of interest and relevance, as follows:

"The employer involved in this dispute is the Railway Express Agency, Inc., and the labor organization is the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. For convenience they are referred to as the Agency and the Organization in this report.

The Agency operates its well known express service throughout the United States and elsewhere; its stock is owned by some 70 railroads, and **it is generally regarded as the express department of the railroad industry.** * * *" (p. 1.)

"**The Agency is conceded to be part of the railroad industry,** *having been referred to by its counsel as the express department of the railroads.* In one particular after another in its labor relations, boards have identified it with the nonoperating activities of the railroads and have applied practically identical treatment. * * *

It is the Board's view that no case against the establishment of a 40 hour week similar to that agreed upon by the railroads and their nonoperating employees could be made out by the Agency. The practice of treating its employees as nonoperating railway employees is too firmly entrenched to permit such opposition. * * *" (p. 4.)

"The Board is aware, however, that **the Agency is in financial effect a joint facility or arm of the railroad industry,** and that there are other branches of that industry which, standing alone, are also unprofitable. * * *" (p. 8.) (Emphasis ours.)

Inasmuch as the employees of the Express Agency are dealt with realistically and accurately as railroad employees, by a Board set up under the Railway Labor Act,

why should the Courts which are charged with administration of the Employers' Liability Act close their eyes to the same realities?

The Revenues.

Wells-Fargo Case.	The Present Case.
The Revenues. All net profits payable to a private corporation.	*The Revenues.* All net profits paid to the railroads in direct ratio to their share of the business.

The Express Agency was so set up that it could neither have profits or losses; but all revenues (after payment of the actual costs of the operations) are paid over to the railroads in proportion to their share of the business.

The exact provisions for the allocation of the revenues of the Express Agency to the various railroads are somewhat complicated, and are set forth in great detail in the Identical Agreements.

The net result of these provisions however may be stated very simply:

(1) All of the expenses of the operation of the Express Agency are first deducted from the gross receipts.

(2) All of the remainder is remitted to each of the railroads in direct proportion to its share of the business.

The Express Agency is a no-profit corporation. It can neither earn a dollar or lose a dollar and it can not declare any dividends. It is simply the convenient collective means or agency by which the railroads operate collectively this part of their railroad business.

They act separately as to the passenger business.

They act separately as to the heavy freight business.

But they act collectively as to their fast freight department of their business.

We repeat: Although the Express Agency is a separate corporation it can not declare a dividend; nor divert one cent of the revenues to its own private purposes at private advantages; *or to the private purposes or private advantages of its Railroad stockholders.*

This is conceded by the Express Agency in a statement in a Brief which it filed with the Interstate Commerce Commission on June 20, 1946:

> "Petitioner (that is, the Express Agency) is a joint operating facility owned by the principal railroads. It conducts the express transportation business *as agent* for the carriers, both stockholders, and non-stockholders, under operating agreements which provide for payment out of express revenues and income of all expenses and charges of the Petitioner, *and the accounting of the remainder to the carriers* as the only compensation they receive for hauling express traffic. *Petitioner retains no part of its revenues for itself.*" (Petition of Railway Express Agency, Inc. for Authority to Increase Express Rates and Charges; June 20, 1946; p. 5.)

And in an earlier Petition filed with the I. C. C. on June 8, 1938, there appears this statement (p. 13, Exhibit A):

> "Note: Net income beginning March 1, 1929, includes no profit for *Railway Express Agency, Inc.*, which *is a non-profit organization acting as agent for the railroads.*"

To make all of this still more clear, the figures which are in evidence show that for the year 1945, for example, the Express Agency had a gross income for its railroad services of 416 million dollars.

After the payment of the salaries of its 79,000 employees and other actual costs of the business, there was left a net profit of 143 million dollars.

This sum of 143 million dollars was paid in its entirety to the railroads in proportion to the amount of the express business each of them had.

The Messenger's Employer.

Wells-Fargo Case.	The Present Case.
The Messenger's Employer. A genuine independent corporation. As the Supreme Court said: "The messenger * * * was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed, and paid, and at whose will he was to continue in service or be discharged."	*The Messenger's Employer.* Since the messenger (the plaintiff) was in the employ of the "agent" of the railroads, it would be natural that he could be discharged at the orders of the railroads. This is specifically provided for in the Identical Agreement, Article XII.

It is our contention that plaintiff was an "Employee" of the Railroad within the terms of the Act, and entitled to its benefits.

We have argued at some length, that there was an essential identity as between the Express Agency on the one hand, and the Railroads, on the other.

Without repeating those arguments here, it must be obvious that they have equal force to prove the liability of the Railroad as to prove the liability of the Express Agency.

Certainly if the plaintiff was an employee of the Express Agency, and if the Express Agency is essentially identical with the railroads whose collective agency it is, then the plaintiff must be an employee of the Railroad over whose lines he was running.

In the light of the facts already set forth it is not necessary to argue that both the plaintiff and the Railroad were engaged in interstate commerce; nor that the Railroad was engaged in carrying on the business of a common carrier by railroad.

But was plaintiff an employee of the Railroad—so as to permit him to have a right of action against the Railroad—under the Act?

Clearly, *in name,* he was *not* an employee.

But was he—*in fact,*—an employee, within the provisions of the Act?

First of all, it is not necessary, in order to be entitled to the benefits of the Act as an employee, that one be on a railroad payroll.

It is a commonplace, that a common carrier by railroad is liable not only to its own employees, but to the employees of its agents and contractors, if the work which is being done, is basically and essentially a part of the "railroad" business. This has been the repeated holding of the Court of Appeals of the Sixth Circuit.

In *Erie R. Co. v. Margue*, 23 F. 2d 664 (1928—6th Circ.), plaintiff was not on any payroll of the railroad. On the contrary, he was on the payroll of a completely independent contractor. But since the work which he was doing, was essentially "railroad" work, it was held that he was entitled to bring his action as an "employee" of the railroad, under the Act.

In *Cimorelli v. N. Y. Central R. Co.*, 148 F. 2d 575 (1945—6th Circ.), plaintiff was not on any payroll of the railroad. He also was on the payroll of a completely independent contractor. So also in *Penna. R. Co. v. Roth*, 163 F. 2d 161 (1947—6th Circ.) and *Penna R. Co. v. Barlion*, 172 F. 2d 710 (1949—6th Circ.) Yet in each one of these cases, a man who was injured while on the payroll of a completely separate corporation, was held entitled to recover against the railroad, whose "railroad" business was being performed by him at the time he was injured.

We submit, therefore, that the mere fact that the plaintiff's name appeared on the payroll of the Express Agency is of no decisive importance.

The real question is whether or not the work which he was doing was—under the circumstances—the work of the "common carrier by railroad." And if the answer to that question is in the affirmative, then certainly plaintiff has the same rights of an "employee" as Margue, and Cimorelli, and Roth, and Barlion.

Secondly, we point out that although *in name* the plaintiff was an employee of an agent of the railroad, rather than a direct employee of the railroad itself, the facts show a rather complete control over him in his immediate activities *by the Railroad.*

The right of discharge has always been accepted as one of the important tests of the relationship of master and servant. While it is not always completely decisive, it is certainly highly persuasive.

And the Railroad had this vital right of discharge over plaintiff.

The Identical Agreement contained this language:

> "ARTICLE XIII. All of the agents and employees of the Express Company, while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and *in case any messenger or other employee* on any said lines *shall from any cause be objectionable* to the Rail Company, *he shall be* removed or *discharged upon the written request of the Rail Company* or of the Rail Company's principal operating representative." (Emphasis ours.)

But not only did the Railroad have the right to discharge the plaintiff if it saw fit, for "any cause," but the evidence shows another of the indicia of master and servant relationship.

It is frequently said that an independent contractor is one who is subject to control only with respect to the general aims to be accomplished; while a servant or employee is one who is subject to control in the details of its accomplishment.

What are the facts on this point?

Plaintiff was compelled to obey and conform to *all* of the *rules of the Railroad*!!

This is stated in the provision (ARTICLE XIII) quoted immediately above. **"All of the * * * employees of the Express Company * * * shall at all times conform to the general rules" of the Railroad.**

In order that the full impact of this language may be realized, we call the attention of the Court to the answers of the defendants to two Supplemental Interrogatories:

> 25. In the copy of the agreement between the defendants which is attached to the answers to the Interrogatories, it is stated (Article XIII) that "all of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon."
>
> State whether the plaintiff was an agent or employee of the Agency within this provision while on the train 2/23.
>
> Answer: *Yes.*
>
> 26. If the answer to the preceding question is "Yes," state what "general rules" of the defendant Railroad Company are referred to.
>
> Answer: The words are to be construed broadly and *include all rules promulgated by the New York Central Railroad* Company *covering all phases of train operation.* Some of the rules are *printed,* others are mimeographed, and some are *oral.* (R. pp. 32, 37.)

When a man is subject to discharge by the Railroad if he becomes objectionable to the Railroad *"from any cause,"* it certainly sounds like the relationship of master and servant.

And when it also appears that he must "conform" to "all rules promulgated" by the Railroad "covering all phases of train operation," whether *"printed" or "oral,"* it would certainly appear that his activities were those of an employee, no matter what he might be called.

Third: The fact that the railroads have incorporated separately this one department or branch of their business, can not avail to defeat the plain provisions of the Act.

Section 5 of the Employers' Liability Act (45 U. S. C. A. Sec. 55) expressly invalidates any "contract, rule,

regulation, or device whatsoever" which attempts to help a common carrier to escape the liability of the Act.

Suppose a railroad should attempt to incorporate separately each ten mile section of the line, and then to operate all of these subordinate or underlying corporations through one large holding corporation. Could there be any doubt that each of the small, junior corporations for which a section man might work would be liable as a common carrier by railroad, even if it did not own a train or a car?

Suppose again that a railroad were to attempt (a) to incorporate separately each ten mile section of its line; and then (b) to incorporate separately a corporation to own and operate all of its locomotives; and then (c) to incorporate separately a corporation to own and operate all of its freight cars; and finally (d) to incorporate separately a corporation to own and operate all of its passenger cars.

Could it then be claimed that the brakemen on the freight cars were not working for a common carrier by railroad, because that particular corporation would not own any *rails* or any *engines*?

Is it possible that any court would take seriously the effort to divide its business into small pockets and departments, so as to prove that the general business of a "common carrier by railroad" had somehow evaporated into vague and amorphous shadows?

The Supreme Court of the United States has been emphatic in holding that the liability created by the Employers' Liability Act can not be whittled away by ingenious contracts or devices. *Philadelphia R. Co. v. Schubert,* 224 U. S. 603; 56 L. Ed. 911; *Duncan v. Thompson,* 315 U. S. 1; 86 L. Ed. 575.

In the *fourth* place, the railroads have been direct and very emphatic in their assertions that the "express" busi-

ness which they are carrying on, is only one department of their general "railroad" business.

For example, there is in evidence, a booklet which is entitled the "Year Book of Railroad Information," which is published by the "Eastern Railroad Presidents Conference Committee on Public Relations." The authenticity of this booklet is established by answers to interrogatories, as follows:

> "Q. Was the New York Central Railroad Company in 1947 a member of 'Eastern Railroad Presidents Conference Committee on Public Relations'? Answer: *Yes.*
>
> Q. Was a pamphlet issued by said Conference Committee in June of 1947 as indicated by the copy attached hereto and marked Exhibit B? Answer: *Yes.*
>
> Q. Are the statements contained in said pamphlet (Exhibit B) on pp. 46 to 49 inclusive, and on p. 57, correct statements of fact? Answer: *Yes.*" (R. 44, 45.)

This booklet of 96 pages, gives an immense amount of information regarding the railroads of this country.

Among the many tables, both statistical and graphic, with which the booklet is filled, are tables which show that the railroads regard the "express" business as merely one of the principal departments of their business.

We call attention to a few statements in this "Yearbook of Railroad Information."

> "The 1947 edition of the Yearbook presents **a summary of railroad operations** in 1946 during which the usual characteristics of a transition from war to normal peace time activity were experienced." (p. 1.)

On page 57, we find the following:

> "Operating Revenues and Expenses
>
> A summary of the revenues and expenses of the Class I railways is shown below for the years 1946 and 1945.

Account	1946	1945
Freight Revenue	$5,786,251,712	$6,533,767,008
Passenger Revenue	1,259,168,736	1,716,379,470
Mail Revenue	129,000,744	129,571,449
Express Revenue	92,730,354	143,968,567
All other Revenue	360,161,845	378,561,845
Total Operating Revenue	7,627,313,391	8,902,248,339
Maint. of way and structures	1,150,232,630	1,411,303,807
Maintenance of equipment	1,468,963,494	2,147,405,914
Traffic	164,744,280	144,133,008
Transportation	3,212,244,870	3,015,571,608
General	232,045,602	211,019,602
All other expenses	129,319,790	122,193,280
Total Operating Expenses	6,357,550,666	7,051,627,219
Operating Ratio	83.35%	79.21%

In 1946, revenues and expenses declined, compared with 1945, the former, $1,274,934,948 and the latter, $694,076,553. Because expenses did not decrease at the same rate as revenues, the operating ratio * * * rose from 79.21 to 83.35 per cent. With the exception of 1919 and 1920 when the operating ratios were 85.52 and 94.32 respectively, the operating ratio of 1946 is the highest on record.

Freight revenue declined $747,515,137; passenger revenue, $457,210,734; mail revenue, $570,705; **express revenue**, $51,228,213; and all other revenue, $18,400,000. * * *'' (Emphasis ours.)

We cite this page of the Yearbook of the Eastern Railroads to show how the railroads regard their own express business.

It is merely one of the departments of the railroad business.

And since it is one of the departments of that business, the plaintiff while employed in that department was of necessity engaged in ''railroad'' business.

Finally, it is interesting to note that in the very book of instructions which was given to this plaintiff and to every other man employed as an Express Agency "messenger" *in name,* or freight handler *in fact,* it is stated emphatically that the plaintiff was a "train employee." The title of the Book, which is in evidence, is:

INSTRUCTIONS TO TRAIN EMPLOYEES

On page 1 (of this 115 page book) there is this statement:

> TRAIN EMPLOYEES: This book is issued to provide to Messengers and other train employees, for ready reference, copies of general rules and instructions which most directly apply to Messenger Service. * * *
>
> We look to train employees to do their full share to maintain the high standard of efficiency and safety which has made it possible for the express business to operate and grow.

A few of the rules in this book of INSTRUCTIONS TO TRAIN EMPLOYEES which show that the work was essentially "railroad" work are as follows:

> 206. All traffic moving over our own lines must be forwarded under instructions issued from time to time by the Traffic Department or the Department of Transportation. (p. 10)
>
> 208. In order to permit allocation of earnings to the proper railroad, all way bills must be stamped at point of origin, en route and at destination to show names of railroads and transfer points. * * *
>
> 210. Before starting out in their runs, messengers must inform themselves as to the contents of all express cars in the train, and be prepared at stopping points en route, to direct or answer inquiries of helpers and transfermen in regard to loading and unloading.
>
> 211. They must also require an employee at principal stopping points to examine the fastenings and seals of all cars, and report their condition. (p. 11)

213. Messengers must render complete 'Car Movement Advice' covering refrigerator, horse and automobile cars moved in their trains whether loaded or empty.

214. Agents must be prepared to load and unload express matter promptly to avoid delay to train. * * *

215. To facilitate the work of messengers, agents at way stations where any considerable amount of freight is put on trains, must see that shipments destined to the first three points at which the train there after stops, are kept separate and are not put into the car until all other freight has been loaded. * * *

216. To insure discharging freight within the time allowed for train stop and to avoid carrying matter beyond proper destination, messengers must have freight ready to unload as soon as the train comes to a stop. (p. 12)

865. Train employees must report for duty at terminal offices in such advance of leaving time of their trains, as instructed.

875. Train employees should be thoroughly familiar with the rules of the railroad company relative to steam heating, signalling air brakes, etc., and thus be prepared for emergencies.

876. When on trains and boats, express employees will be subject to the rules applying to employees of companies operating such lines, insofar as they do not conflict with this Company's instructions. (p. 78)

It might be noted also, that the jobs of handling the "freight" as it is frankly called in the above rules, were posted for seniority "bids," exactly as other railroad jobs are posted and "bid" for.

One such notice which was put in evidence listed "1 vacancy" in a "16 man pool" for "handling freight" etc. on six listed and numbered trains on the New York Central, between Cleveland, Ohio, and St. Louis, Mo. The Notice which is dated July 13, 1945, ends with this legend:

Please have this bulletin posted where it may readily be seen by all trainmen in District No. 4.

Plaintiff was one of these "train employees." He was one of these "freight handlers." He was on one of these regular "runs" on a "railroad train" from Cleveland to St. Louis.

We submit that plainly this was "railroad" work, and that if Margue, and Cimorelli, and Roth and Barlion were doing "railroad" work while on the payroll of independent contractors, surely plaintiff while on the payroll of a Railroad "agent," was also doing "railroad" work, and entitled to the benefits of a "railroad" employee under the Act.

The effect of the 1939 Amendment of the Employers' Liability Act should not be overlooked.

The original Act was adopted in 1908, and the books are filled with many hundreds of cases where the courts wrestled with the problem as to whether in a particular case the employment of a railroad worker involved "interstate commerce by rail" so as to bring it within the Act.

But in 1939 the following amendment was adopted which has considerably widened this coverage of the Act (Title 45, Sec. 51, U. S. C. A.):

> "* * * Any employee of a carrier, **any part of whose duties** as such employee **shall be the furtherance of interstate** or foreign **commerce; or shall in any way directly or closely and substantially, affect such commerce** as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and **shall be considered as entitled to the benefits of this chapter.**" (Emphasis ours.)

It is well settled that in order to qualify as an "employee" of a railroad company, one need not be in the employ of the "railroad company" which is actually operating the trains.

See, for example, *Wilson v. Terminal R. Ass'n.*, 77 N. E. 2d 429 (1948—Ill.), in which a locomotive engineer on a train operated by the Mobile & Ohio Railroad Company, was held entitled to rights under the Act as an "employee" of a terminal company, merely because the train was operated over the tracks of the terminal company. In the course of its opinion the court said:

> "It is contended by the defendant that the deceased was not an 'employee' under the terms of the Federal Employers' Liability Act and that by reason thereof there can be no recovery by plaintiff as against Terminal Railroad Association, which was the owner of the tracks over which deceased was operating his train. * * * We find no justification for the conclusion that Congress intended the Act to apply only where the formal relationship of master and servant applies."

And in *Kansas City & Southern Ry. Co. vs. Nectaux*, 26 F. 2d 317 (1928-Fifth Circ.), the headnote is as follows:

> "Where defendant was real owner of railroad, held in the name of K Company and had power to vest legal title in itself at any time, and K Company under contract gave G Company joint trackage rights with defendant over the line, G Railroad Company occupied position of defendant's licensee, and defendant held liable in suit under Federal Employers' Liability Act to its employee for injuries caused by the negligence of G Company."

And see *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591 (1913) the Supreme Court of the United States had occasion to consider a somewhat related question. In the third paragraph of the headnote, the matter is stated thus:

> "3. A railway fireman killed while employed in interstate commerce by a lessee interstate railway carrier must be regarded as employed also by the lessor railway company in such commerce, within the meaning of (The Employers' Liability Act) although

the leased railway is an intrastate one, where, under the local law, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of the business upon the lessor's road."

CONCLUSION.

The plaintiff was seriously and permanently injured by the negligence of The Express Agency.

He was (we should think) obviously working in the "furtherance of interstate commerce." He was (we are equally certain) working in the employ of a "common carrier."

He was (beyond all argument) engaged in working for that common carrier on a "railroad," and for a "common carrier" that was certainly an agent of that "railroad," under circumstances where that "railroad" could "discharge" him, and where he had to obey all of the "rules" of the "railroad."

Unless ordinary words have lost all of their ordinary meanings, plaintiff when injured in the scope and course of his duties, ought to be given the protection of the Employers' Liability Act.

Your petitioner, James E. Jones, therefore respectfully requests the Court to grant his Petition for a Writ of Certiorari to review the judgment entered in this case by the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARVIN C. HARRISON,
HARRISON, THOMAS, SPANGENBERG & HULL,
National City Bank Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

APPENDIX I.

Statutes.

SECTION 1: Federal Employers' Liability Act. (Title 45, Sec. 51, U. S. C. A.)

Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

SECTION 5: Federal Employers' Liability Act. (Title 45, Sec. 55, U. S. C. A.)

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. * * *

Interstate Commerce Act. (Title 49, Sec. 1, U. S. C. A.)

SECTION 1. * * * (3) Definitions. The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. * * *

The term "railroad" as used in this chapter shall include all bridges, carfloats, lighters, and ferries used by or operated in connection with any railroad * * * and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported. * * *

Interstate Commerce Act. (Title 49, Chapter 13, Sec. 1002.)

SEC. 1002. * * * (5) The term "freight forwarder" means any person which * * * holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8 or 12 of this title.

APPENDIX II.

Some Excerpts from Agreement Between New York Central Railroad Company and Railway Express Agency, Incorporated.

EXPRESS OPERATIONS.

AGREEMENT BETWEEN THE NEW YORK CENTRAL RAILROAD COMPANY AND RAILWAY EXPRESS AGENCY, INCORPORATED.

Effective March 1, 1929.

THIS AGREEMENT, made as of March 1, 1929, between THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation organized and existing under the laws of the States of New York, Pennsylvania, Indiana, Illinois, Ohio and Michigan hereinafter called the "Rail Company," and the RAILWAY EXPRESS AGENCY, INCORPORATED, a corporation of the State of Delaware, hereinafter referred to as the "Express Company,"

WITNESSETH:—WHEREAS, the Rail Company has united with other carriers operating railroads in the continental United States to *acquire* through their own express agency the properties of the American Railway Express Company employed in the express business, *and to conduct* through such express agency the future operations of the express business; and

WHEREAS, the Express Company has been organized as the joint express agency or facility of the Rail Company and other carriers uniting as aforesaid, all of which have undertaken to enter into agreements with the Express Company identical herewith;

NOW, THEREFORE, for and in consideration of the mutual covenants, separate services and payments hereinafter recited to be by the parties kept, performed and made, the parties do hereby agree as follows:

ARTICLE I.

DEFINITION.

SEC. 1. The express transportation business to be carried on under this agreement is understood to mean such express transportation business as was carried on by the American Railway Express Company under the contract known as the "Amended Uniform Contract for Express Operations" effective March 1, 1923; together with transportation of property, under the conditions provided in Section 3 of Article II hereof, by means of the instrumentalities named therein. The maximum weight to be carried in any of the cars carrying express business shall not exceed a limit which in the judgment of the Rail Company is necessary for safety. Articles which can only be loaded and unloaded through end doors of express or baggage cars, causing delays to passenger trains in switching for this purpose, shall not be accepted by the Express Company unless a special car is furnished and charged for as a carload shipment, and the Express Company shall not accept shipments which cannot be so handled as to avoid unusual delays to the trains of the Rail Company; Provided, however, that nothing in this section contained shall be construed to prevent the Rail Company from performing any transportation service required by any present or future law.

SEC. 2. Said express transportation business shall be conducted under such rates, charges, classifications, divisions, rules regulations, and practices and subject to such limitations and conditions as are now or may hereafter be lawfully established, provided: (*a*) that, where car-load rates are made for express matter, the minimum weight shall not be less than at the time prescribed by the railway companies for freight, unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company; and (*b*) that rates per 100 pounds made for express matter shall not be less than twice the prevailing class freight rate, between the same points, and in no event less

than twice the prevailing first class freight rate unless otherwise ordered by Federal or State Commissions or concurred in by the Rail Company.

ARTICLE II.

APPOINTMENT OF AGENT. FILING OF TARIFFS.

SEC. 1. The Rail Company hereby constitutes and appoints the Express Company its exclusive agent (a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extentions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained. All classifications, tariffs and other rules or regulations relating to the transportation of express matter required or permitted to be filed with the Interstate Commerce Commission or other public body may be filed by the Express Company on its own behalf and/or on behalf of the Rail Company and other carriers with which the Express Company may enter into agreements similar hereto, and to this end the Rail Company hereby constitutes the Express Company its true and lawful agent for the purpose of filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter.

EXCEPTIONS IN TRANSPORTATION.

SEC. 2. The Rail Company further agrees that it will not for compensation knowingly transport valuables,

money, goods or property of any description independently of the provisions of this agreement, or permit its officers, agents or employees to do so on any of its passenger, express or mail trains, except as follows:

(a) Where, under the terms of the "Amended Uniform Contract for Express Operations" effective March 1, 1923, the Rail Company was entitled to the exclusive or joint right to handle any particular commodity upon passenger, mail or express trains, the Rail Company hereby reserves such exclusive or joint right as to such commodity under this agreement.

(b) Where the Rail Company serves written notice upon the Express Company of its election to suspend the agency of the Express Company to transport property in carload shipments, as defined in Section 1 of Article V hereof, in which event and unless and until such election shall be revoked the Rail Company may move such carload shipments in its passenger, express or mail trains independently of the provisions of this agreement.

The Rail Company reserves the right to transport any property independently of this agreement by means of motor truck, aircraft or any other instrumentality than railroad train, and to perform in connection therewith the auxiliary service commonly known and referred to as pick up and delivery.

SEC. 3. The Express Company may engage by means of motor truck, aircraft or any other instrumentality than railroad train, in the transportation of property which would otherwise be transported on trains of the Rail Company, but only with the consent of the Rail Company and of all other carriers executing this form of agreement which would participate in such transportation if conducted by railroad; provided that any such consent may be withdrawn by not less than six months written notice; and provided further that as to any transportation by motor truck or aircraft conducted by the American Railway

Express Company on February 28, 1929, the consent hereinbefore required shall be assumed unless and until such assumed consent shall be withdrawn or terminated by not less than six months written notice.

* * * * *

ARTICLE III.

CARS. TRAINS. EQUIPMENT.

SEC. 1. The Rail Company shall as soon as practicable furnish space in cars, adequate in number and suitable for use in passenger, mail, or express train service at passenger train speed; said cars to be properly heated and lighted, and lettered "Railway Express Agency, Inc."; and shall transport said cars on such passenger, mail, or express trains as may be agreed to, from time to time, as necessary to meet the reasonable requirements of the public for express service. The Rail Company shall carry in such cars the express matter, with the safes, packing trunks, and train supplies and equipment of the Express Company, together with the messengers, helpers and guards of the Express Company, necessary for the handling of such express matter to destination or to the proper transfer points.

SPECIAL TRAINS.

SEC. 2. Special express trains, if run by the Rail Company, shall be run without extra compensation to the Rail Company.

BAGGAGE CARS.

SEC. 3. In order that the Rail Company may not be required to run more cars than are necessary, the Express Company shall use the unoccupied space in the baggage and other passenger train cars of the Rail Company to the greatest extent practicable, and the Rail Company shall

likewise have the right to use any unoccupied space in any car supplied by the Express Company.

RENTED CARS.

SEC. 4. Whenever the Express Company to meet emergency shipments is obliged to rent live stock, refrigerator, or other cars to handle such shipments by reason of suitable cars not being available on the railroad on which the traffic originates, the Rail Company agrees that it will assume the entire rental payment for such cars when the shipment moves exclusively over its lines; and when the movement is partly over its lines and partly over the lines of one or more other railroads the Rail Company shall assume such part of the rental charge as the proportion of the express revenue on the shipment earned on the Rail Company's lines bears to the total express revenue on the shipment; provided, however, that where shipper is required to pay an additional charge for such rented equipment, the rail companies involved will be credited with such additional charge.

TRAIN STOPS. ACCESS TO STATIONS AND TERMINALS.

SEC. 5. The Rail Company agrees to stop its trains at stations where they are scheduled to stop in such a manner and for such time as will permit the Express Company by due diligence, and with sufficient force, to load on and to unload from trains all express matter carried or to be carried on such trains as will not unreasonably interfere with other business of the Rail Company, and, under like conditions, the Rail Company shall provide the Express Company, without compensation other than that provided in Articles IV and V, access to and from station platforms, trains and terminals, for its employes, vehicles and other conveyances for the handling, loading and unloading of property or express matter carried or to be carried on trains of the Rail Company. Nothing in this agreement

shall operate to interfere with the performance by the Rail Company of any of its obligations in respect to the carriage of the United States mails.

ARTICLE IV.

USE OF STATION BUILDING.

SEC. 1. In cases where an employe of the Rail Company acts as agent for the Express Company, the Rail Company, to the extent that it reasonably can, shall allow the Express Company the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences, such as heat, light, and use of telephone at station, without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.

* * * * *

SEC. 7. All switch tracks, side tracks and other tracks used or furnished for handling express business shall be considered as railroad facilities furnished by the Rail Company for the compensation provided in Article V of this agreement, and without other compensation or charge.

* * * * *

ARTICLE VI.

The Express Company shall as soon as practicable furnish adequate and suitable equipment, and shall use its vehicles, property, offices, and other facilities, and its agents and employees in operating an express transportation business as agent of the Rail Company; and in the conduct of said business shall exert itself in all proper ways to make said business satisfactory to the public and to the Rail Company.

* * * * *

ARTICLE XIII.

RULES.

All of the agents and employees of the Express Company while on the premises or on lines of the Rail Company, shall at all times conform to the general rules in force thereon, and in case any messenger or other employee on any said lines shall from any cause be objectionable to the Rail Company, he shall be removed or discharged upon the written request of the Rail Company or of the Rail Company's principal operating representative.

* * * * *

ARTICLE XVI.

SWITCHING CARS.

SEC. 1. The Rail Company agrees to provide, without compensation other than as provided in Article V of this agreement, all switching of cars in express service, such as ordinary switching in connection with regular or special trains at stations or union depots involving movements to and from the stations or union depots, and also to and from tracks or sidings for the handling of express traffic at stations or union depots and delivery of cars to connecting railroads.

SWITCHING LIVE STOCK.

SEC. 2. The Rail Company also agrees to provide, without compensation other than as provided in Article V of this agreement, all necessary switching of cars for icing in transit, also switching of cars for live stock in transit to and from stock chutes or stock yards for loading, unloading, feed, water, or rest.

TERMINAL AND BELT LINES.

SEC. 3. When, in transferring cars in express service to another contract line, it is necessary to switch such cars over terminal, belt, or short line railroad because of the lack of the Rail Company's physical track connection with the other contract line, the cost of such switching shall be paid by the transferring Rail Company.

SEC. 4. When, in order to handle express matter to and from a point contiguous to the end of the rail line, or to reach the lines of a connecting railroad, it is necessary to use a bridge, ferry, float or lighter service, the bridge and ferry tolls and float or lighterage charges shall be borne by the originating, delivering, or transferring Rail Company as the case may be.

BRIDGES, FERRIES AND LIGHTERS.

SEC. 5. All switching, ferrying, float or lighterage referred to in the foregoing Sections 1, 2, 3 and 4 will apply only when such switching, ferrying, float or lighterage has to do with the usual transportation by the carrying line to or from or between the points where the rate applies under which the carrying line handled the shipment. For all special switching, ferry, float or lighterage service, performed for the Express Company, it shall pay such reasonable charge as the Rail Company may establish.

SEC. 6. Adequate charges for demurrage on cars carrying carload traffic, so far as it lawfully may be done, shall be assessed by the Express Company, in order to insure the prompt loading and unloading of express matter to and from cars on the line of the Rail Company and payments of such charges shall accrue to the Rail Company.

ARTICLE XVII.

REFRIGERATION.

The Express Company agrees that the icing and refrigeration of cars in the service of the Express Company while on the lines of the Rail Company shall be performed by the agency employed by the Rail Company for this purpose, for account of the Express Company, the Rail Company agreeing that the charges for such service shall be reasonable.

* * * * *

ARTICLE XIX.

The Express Company hereby agrees from time to time to take or unite with the Rail Company and other interested carriers in taking such action to secure just and reasonable express rates as may at any time become necessary either before the Interstate Commerce Commission or before the several state commissions, or both.

ARTICLE XX.

All of the contract provisions embodied herein are agreed to by both the Rail Company and the Express Company as being inseparable and interdependent, and shall take effect on March 1, 1929, and shall continue in force until midnight on February 28, 1954.

ARTICLE XXI.

All of the benefits and obligations hereof shall inure to and be binding upon the successors and assigns of the parties hereto, and it is further agreed that this agreement and all rights of the Express Company hereunder may be mortgaged or pledged as security for any notes, debentures or other obligations which may be issued by the Express Company.

IN WITNESS WHEREOF, the parties hereto, by their proper officers thereto duly authorized, have respectively executed these presents in duplicate as of the day and year first above written.

RAILWAY EXPRESS AGENCY, INCORPORATED,

By (Signed) W. A. BENSON,

Executive Vice President.

(Seal)

OK HSM

Attest:

(Signed) E. R. MERRY, JR.,

Secretary.

THE NEW YORK CENTRAL RAILROAD COMPANY,

By (Signed) P. E. CROWLEY,

President.

Attest: RFC

(Signed) J. M. O'MAHONEY,

Assistant Secretary.

(Seal)

AUG 15 1950
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 199

JAMES E. JONES,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,
and
RAILWAY EXPRESS AGENCY, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

JAMES E. JONES,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

and

RAILWAY EXPRESS AGENCY, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court and the opinion of the Court of Appeals for the Sixth Circuit are attached to this brief as an Appendix.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Is there any rule stated in *Pacific Express Co. v. Seibert,* 142 U. S. 339, 35 L. Ed. 1035 (1891), determining whether an employee of the Railway Express Agency, Inc., or any other express company is afforded protection under the Federal Employers' Liability Act?

STATUTE INVOLVED.

The pertinent part of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) is set forth on page 4 of this brief.

COUNTERSTATEMENT OF FACTS.

Necessarily, the claim set forth by plaintiff in his complaint is based upon the Federal Employers Liability Act (45 U. S. C. A. Sec. 51). Any claim or cause of action which plaintiff may have had other than under the Employers Liability Act was barred at the commencement of this action both by the running of the Indiana statute of limitations (Burns' Indiana Statutes, Ann., 1933, Sec. 2-602; Hirschberg Affidavit, R. p. 19), and by the fact that plaintiff as an employee of the Railway Express Agency, applied for and received compensation benefits under the Indiana Workmen's Compensation Act (Burns' Indiana Statutes Ann., 1933, Sec. 40, 1206-1213; Hirschberg Affidavit, R. p. 19 & 20; Jake's Affidavit, R. p. 14).

Defendants did file a motion for summary judgment (R. 13), as stated in the petition (p. 5). After the hearing on the motion for summary judgment it was stipulated between and among the parties (R. 45) that a trial by jury was waived and that the trial and determination of all issues of law and fact in this case were submitted to Judge Freed for decision upon the answers to interrogatories, exhibits, affidavits, statements and records filed. Thereafter the following order was entered (R. 57):

> "This matter came on for hearing upon the pleadings, the evidence, the motion for summary judgment and the stipulation waiving a trial by jury and submitting the case to the court for trial and determination, and the court finds that plaintiff was an employee of the Railway Express Agency, Inc. and not an employee of the New York Central Railroad Company and finds that Railway Express Agency, Inc. is not a 'common car-

rier by railroad' and the Federal Employers Liability Act is not applicable.

It is ordered that judgment be and it is hereby entered in favor of both defendants and against the plaintiff together with the costs herein.

FREED, *District Judge.*"

It is apparent from the above that the trial court, as the trier of the facts, decided the cause upon its merits in favor of both defendants.

All of the evidence establishes that the plaintiff was hired and paid by the Railway Express Agency, Inc., and that company alone had the right to control plaintiff in the details of his work. Similarly, all of the evidence establishes that the New York Central Railroad Company alone operated all train equipment, including any railroad cars owned or leased by the Express Agency. There is no evidence establishing that the Express Agency operated 780 railroad cars or any railroad cars, as stated in petitioner's brief (page 18).

All of the evidence establishes that the Railway Express Agency, Inc., is a separate corporation having its own officers, directors and employees, maintaining its own office and keeping its own records. It is not a railroad company, does not *operate* any railroad facilities, and is not a freight forwarder, but is a common carrier using the facilities of various railroads, motor carriers, navigation companies and air lines and carrying on that business as its own.

ARGUMENT.

I. THE CASE WAS CORRECTLY DECIDED BY THE DISTRICT COURT AND BY THE COURT OF APPEALS.

A. The Railway Express Agency, Inc., is not a railroad and so is subject to the various State workmen's compensation acts, and not to the Federal Employers' Liability Act.

The Federal Employers Liability Act provides (45 U. S. C. A., Sec. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> * * * * *
>
> "Any employee of a carrier, any part of whose duties as such employee * * * shall, in any way * * * affect such commerce as above set forth shall, * * * be considered entitled to the benefits of this chapter."

The Railway Express Agency, Inc., is not a "common carrier by railroad," i.e., it is not a railroad company any more than is it a motor carrier, a navigation company, or an air line. The Federal Employers Liability Act was intended to apply and does apply only to railroads. It has at all times been so interpreted by the courts. To apply the act to other than railroads would be to disregard the clear language of 45 U. S. C. A., Sec. 51 "common carrier by railroad," "cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment," and similar language in subsequent sections of the Act obviously applicable to railroads alone.

The Railway Express Agency, Inc., is a common carrier and uses the facilities of railroads, motor carriers, navigation companies and air lines in conducting its express business. By such use as it makes of those facilities it obviously does not thereby become a railroad, motor carrier, navigation company or air line. It is under the jurisdiction of the Interstate Commerce Commission by virtue of an express provision in the Interstate Commerce Act (49 U. S. C. A. 1) as follows:

> (3)(a) "The term 'common carriers,' as used in this chapter shall include all pipeline companies; *express companies,* * * *."

In *Wells Fargo & Co. v. Oscar G. Taylor,* 254 U. S. 175; 65 L. Ed. 205 (1920), Taylor, an express messenger for Wells Fargo & Company, a common carrier by express, was injured when an express car in which he was working derailed. The express car was part of a passenger train of the St. Louis & San Francisco R. R. Company, against which railroad plaintiff obtained a judgment. Thereafter the express company brought its suit in equity against Taylor to enjoin enforcement of the judgment. The action was based upon the operating agreement between the express company and the railroad and a contract between Taylor and the express company providing that neither the express company nor the railroad should be liable for any injury received while on the railroad company's trains. The operating agreement provided that the railroad would furnish suitable cars for express and haul them in its passenger trains, together with express messengers. It further provided that the express company would make stated payments and assume all risk and damage to its employees. The District Court granted the injunction which was reversed by the Circuit Court on the ground that the express company was a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act and that under Section 5 of the Act the messenger's agreement was

void. The U. S. Supreme Court reversed the Circuit Court and affirmed the granting of the injunction, holding that the Federal Employers' Liability Act did not apply. The Supreme Court said (65 L. Ed. 213):

> "In our opinion the words 'common carrier by railroad,' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see Southern P. Co. v. Jensen, 244 U. S. 205, 212, 213, 61 L. Ed. 1086, 1096, 1097, L. R. A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597); by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars, and other appliances intended to promote the safety of railroad employees (see San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 484, 60 L. ed. 1110, 1117, 36 Sup. Ct. Rep. 626); by the use of similar words in closely related acts which apply only to carriers operating railroads (March 2, 1893, 27 Stat. at L. 531, chap. 196, Comp. Stat. Sec. 8605, 8 Fed. Stat. Anno. 2d ed. p. 1155; May 30, 1908, 35 Stat. at L. 476, chap. 225, Comp. Stat. Sec. 8624, 8 Fed. Stat. Anno. 2d ed. p. 1199; May 6, 1910, 36 Stat. at L. 350, chap. 208, Comp. Stat. Sec. 8642, 8 Fed. Stat. Anno. 2d ed. p. 1420); and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads, but not express companies doing business as here shown (1 Inters. Com. Rep. 677, 1 I. C. C. Rep. 349; United States v. Morsman, 3 Inters. Com. Rep. 112, 42 Fed. 448; Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 659, 662, s.c. 35 C. C. A. 172, 92 Fed. 1022. And see American Exp. Co. v. United States, 212 U. S. 522, 531, 534, 53 L. ed. 635, 639, 640; 29 Sup. Ct. Rep. 315).

As Taylor was not an employee of the railroad company, and the express company was not within the

Employers' Liability Act, it follows that the act has no bearing on the liability of either company, or on the validity of the messenger's agreement."

In *United States Ex Rel. Chicago, N. Y. & Boston Refrigerator Co. v. Interstate Commerce Commission,* 265 U. S. 292; 68 L. Ed. 1024 (1924), the plaintiff in error applied to the Interstate Commerce Commission for a certificate as provided for in Section 209(c) of the Transportation Act. The Commission refused the certificate and a mandamus action was then filed. The Supreme Court, in affirming the dismissal of the petition in the mandamus action said (p. 294):

> "The single question presented is whether the Car Company is a 'carrier by railroad'."

And further (p. 295):

> "In Wells, F. & Co. v. Taylor * * * this court defined the words 'common carrier by railroad,' as used in the Employers Liability Act * * * to mean 'one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.' If this definition be applied here, it disposes of the question against the contention of the Car Company, since it is plain that it does not operate a railroad,—that is, it is not a railroad company acting as a common carrier."

Admittedly there are some dissimilarities between the *Wells Fargo* case and the instant case, or between the Wells Fargo Company and the Railway Express Agency, as pointed out in petitioner's brief. That said dissimilarities are not a basis for distinguishing the *Wells Fargo* case seems clear. The crux of the *Wells Fargo* decision is stated by the court in the following language (254 U. S. 187):

> "and so the question is presented whether the Act embraces a common carrier by express, which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown."

See also *Ellis v. Interstate Commerce Commission,* 237 U. S. 434; 59 L. Ed. 1036 (1915); *Southeastern Express Co. v. American Rwy. Express Co.,* 265 U. S. 426; 68 L. Ed. 1087 (1923); *U. S. v. Fruit Growers Express Co.,* 279 U. S. 363; 73 L. Ed. 739 (1929); *Gaulden v. Southern Pacific Co.,* 78 Fed. Supp. 651 (1948); *Higgins v. Erie Railroad Company,* 89 N. J. Law 629; 99 Atl. 98; *State Ex Rel. Great Northern Express Co. v. District Court,* 142 Minn. 410; 172 N. W. 310.

The Federal Employers Liability Act was amended in 1939. However, in that amendment there was no change made in the description of the employer liable under the Act. Prior to this 1939 amendment several statutes were enacted by Congress concerning the social security of employees engaged in interstate commerce. In every one of these statutes Congress recognize the distinction between a common carrier by railroad and an express company. See the Railway Labor Act, 45 U. S. C. A., Sec. 151; the Railroad Retirement Act, 45 U. S. C. A. 228(a) and 228(m); the Railroad Unemployment Insurance Act, 45 U. S. C. A., Sec. 351(a), and (b); the Carriers Taxing Act, 45 U. S. C. A., Sec. 261(a) and (i); the Railroad Retirement Taxing Act, 26 U. S. C. A., Sec 1532(a) and (h).

We find nothing in the various proceedings before the Interstate Commerce Commission referred to in petitioner's brief, pages 30 and 31, to support the proposition that the Express Agency is subject to the Employers Liability Act. It is not disputed that the Express Agency, as its name implies, is the agency designated by the railroads to handle express business. It does not follow and there is no basis in the evidence for arguing that the Express Agency is the agent of any of the railroads, motor carrier companies, navigation companies or air lines whose facilities it uses in the sense that said companies have the right to control the Express Agency in the details of

its work. The Express Agency is not the alter ego of New York Central Railroad Company or of any of the railroads over which it handles express shipments. *Gaulden v. So. Pac. Co., supra.*

The case of *Aetna Ins. Co. v. Railway Express Agency, et al.*, 80 O. App. 30; 48 O. L. A. 342 (1947), referred to in petitioner's brief (p. 32), held that a clause in the Express Agency's Uniform Express Receipt wherein the shipper agreed that the value of the shipment was a stated sum was applicable as against the railroad company as well as the Railway Express Agency. The decision of the court was predicated upon the agreement by the shipper in the express receipt that its terms should apply to "all carriers handling this shipment" and the court concluded that the railroad was one of the carriers handling the shipment.

B. There is no "essential identity" between the railroads and the Railway Express Agency, Inc., which is a separate, independent corporation whose employees are its employees alone.

As already pointed out, the Railway Express Agency, Inc., is a separate, independent corporate entity maintaining its own separate offices and having its own directors, officers and employees. It is not a subsidiary of The New York Central Railroad Company which owns but 96 of the 1,000 shares of outstanding stock. Its business consists of transporting express shipments on trains of the various railroads, on trucks of various motor carrier companies, on boats of various navigation companies, and on planes of various airline companies. For the purpose of obtaining these transportation facilities it enters into a standard contract, and entered into the Express Operations Agreement (Ex. B, Appendix II, Petitioner's brief p. 51) with 756 railroads throughout the country, including the defendant, The New York Central Railroad Company. By

the terms of that agreement the railroad company grants to the Express Company the privilege of hauling express on the railroad's trains and agrees to furnish express cars and transport them on passenger, mail and express trains, together with such express company messengers, helpers and cars as are necessary to handle the express. It is further provided that the railroad company shall get 85 per cent of the carload gross revenue accruing on its line and its ratable share of the "railroad transportation revenue" as that is defined, as payment for the transportation services of the railroad in hauling said express.

There is nothing in the Express Operations Agreement or in the relationship between the Railway Express Agency, Inc., and the railroads which destroys the separate corporate identity of the Railway Express Agency, and there is no "essential identity" between the defendants herein as argued in petitioner's brief. (pp. 26 *et seq.*) The proceedings before the Interstate Commerce Commission and the provision in the Operations Agreement pertaining to tariffs do not establish any "essential identity." The same are understandable in the light of the provisions in the Operations Agreement that the railroads shall get 85 per cent of the carload gross revenue accruing on their lines and their ratable share of the "railroad transportation revenue" as payment for the transportation services furnished by them. (See 227 I. C. C. 517; 150 I. C. C. 423, *approving and authorizing the Express Operations Agreement.*)

Plaintiff was in the sole employ of the Railway Express Agency, Inc., and was not an employee of the New York Central Railroad or any other railroad, motor carrier, navigation company or air line. His duties did not include any railroad work but consisted solely of handling express business for the Railway Express Agency, Inc., which company alone paid him for all of his services and controlled him in the details of his work. His duties did not require

him to handle any of the railroad's baggage, freight or U. S. mail business nor did they require him to participate in train operation. It is true that the Operations Agreement requires that employees of the Express Agency shall conform to the rules of the railroad *while on the premises or lines of the railroad company* (Article XIII) and upon the written request of the railroad company an objectionable employee of the Express Agency shall be discharged by the latter. This obviously does not grant to the railroad any right to control the employees of the Express Agency in the details of *their work* but is contained in the Operations Agreement for the purpose of safety and to permit the railroad's performance of its function as a carrier. In other words, express employees are obligated to obey railroad rules while on railroad trains or railroad property just as are passengers required to obey railroad rules.

There is no analogy between the relationship of the Railway Express Agency to the railroads and the supposititious case advanced in petitioner's brief (page 41) where a railroad incorporates separately each 10-mile section of its line. Railroads continue to furnish passenger and freight service as they are obligated to do. These are non-delegable duties enjoined upon the railroads, as was held in *Wilson v. Terminal Railroad Association,* 77 N. E. (2d) 429 (Illinois, 1948); *Kansas City & Southern Railway Co. v. Nectaux,* 26 F. (2d) 317 (5th Circuit, 1928) and *North Carolina Railroad v. Zachary,* 232 U. S. 248; 58 L. Ed. 591 (1913) discussed in petitioner's brief (page 47). There is nothing in the Interstate Commerce Act or elsewhere requiring railroads to furnish express service, as distinguished from or in addition to the carrying of freight and passengers as a common carrier.

In an annotation in 47 *L. R. A.* (N. S.) 64 it is stated:

"Express messengers are not employees of the railroad so as to be within the protection of the Federal

> statute where they are employed by the express company, and their connection with the railroad, such as handling baggage, etc., is merely incidental to their employment by the express company."

The annotator cites as authority for his statement *Missouri, Kansas & Texas Railway Co. v. West,* 134 Pac. 655 (Okla., 1913) and *Missouri, Kansas & Texas Ry. Co. of Texas v. Blalack,* 147 S. W. 559 (Texas, 1912), in both of which cases an express messenger of the American Express Company was held not to be an employee of the railroad on whose train he was riding.

In *Robinson v. The B. & O. Railroad,* 237 U. S. 84; 59 L. Ed. 849 (1914), a Pullman porter sought to recover under the Federal Employers Liability Act for personal injuries sustained. The court held that Pullman porters are not railroad employees even though they serve the passengers, saying (pp. 92 & 93):

> "We think it to be clear that in employing its servants the Pullman Company did not act as the agent of the railroad company. The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad company had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company."

In *Chicago, R. I. & P. Railroad v. Bond,* 240 U. S. 449; 60 L. Ed. 735 (1916), a wrongful death action was brought under the Federal Employers Liability Act. The court held that one who as an independent contractor agrees to handle coal and ashes for railroad engines and gets instructions from the yardmaster is not a railroad employee.

Petitioner relies upon the case of *Erie Railroad Company v. Margue,* 23 F. (2d) 664 (6th Circuit, 1928) (Petitioner's brief, p. 38). That case merely holds that maintenance of the tracks, roadbed and structures of a railroad

company is a non-delegable duty, liability for which the railroad cannot escape by delegation to an independent contractor. The court said (p. 665):

> "that responsibility is quite a different thing from the * * * performance of a special service, such as express and sleeping car companies perform, and which the railroad itself is not legally bound to perform. The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights."

The case of *Cimorelli v. New York Central Railroad Company,* 148 F. (2d) 575 (6th Circuit, 1945) is relied upon by the petitioner as are the cases of *Pennsylvania Railroad Co. v. Roth,* 163 Fed. (2d) 161 (6th Circuit, 1947) and *Pennsylvania Railroad Co. v. Barlion,* 172 F. (2d) 710 (6th Circuit, 1949) (Petitioner's brief, p. 38). In these cases the facts are totally different than those in the instant case and the court concluded that the defendant railroad had the right to control the employee in the details of his work, and therefore he was not in fact in the employ of an independent contractor.

II. THERE IS NO CONFLICT OF DECISIONS.

It is contended by the petitioner that the decision of the Court of Appeals is in conflict with the principle of law enunciated in *Pacific Express Co. v. Seibert,* 142 U. S. 339; 35 L. Ed. 1035 (1891), and numerous other decisions by this Court (none of which "other decisions" are identified). This Court announced no principle of law and said absolutely nothing in the *Seibert* case in any way applicable to this case. It held only that a Missouri tax statute applicable to express companies was valid and did not interfere with interstate commerce or violate constitutional provisions requiring equality and uniformity of taxation. The language of the trial court in the *Seibert* case, which petitioner relies upon (Petitioner's brief, pp. 2, 7, 10, 11, 12, 17 & 18) has no bearing whatsoever upon the question here involved. It is obvious that there is no

conflict of decisions in this case. Accordingly the petition should be denied since the only question presented in it is whether a rule stated in the *Seibert* case, rather than *Wells Fargo v. Taylor,* 245 U. S. 175; 65 L. Ed. 205 (1920), determines whether an employee of the Railway Express Agency is afforded the protection of the Federal Employers' Liability Act.

III. THE QUESTION INVOLVED IS NOT OF GENERAL IMPORTANCE.

Petitioner argues that thousands of "railroad workers" are being denied the protection of the Federal Employers' Liability Act because of this Court's decision in the case of *Wells Fargo v. Taylor, supra.* Obviously there are railroad workers who are not employed by a railroad or are not engaged in interstate commerce and so are not covered by the terms of the Federal Employers' Liability Act (Pullman porters, express messengers, independent contractors and intrastate employees). That follows from the fact that Congress has seen fit to limit the Act to common carriers by railroad.

Employees of the Railway Express Agency, Inc., are entitled to the benefits of the various State compensation acts under which the Railway Express Agency, Inc., has qualified, and petitioner, as an employee of the Railway Express Agency, Inc., has already recovered under the Indiana Workmen's Compensation Act. Petitioner, like other Railway Express employees, was not required to gamble on his ability to prove negligence in order to recover the benefits provided by the Compensation Act.

There is not here involved any dispute as to whether petitioner has a remedy for his injuries but only whether his right of recovery is under the State Compensation Act or the Federal Employers' Liability Act. That question is clearly answered both by Congress and by this Court. There is no more question as to whether the Federal Em-

ployers' Liability Act applies to the Railway Express Agency, Inc., than there is as to whether its employees are somehow employees of the New York Central Railroad Company and all of the other railroads in the country.

CONCLUSION.

Petitioner, as an employee of the Railway Express Agency, Inc., properly recovered benefits under the Indiana Workmen's Compensation Act.

The Railway Express Agency, Inc., is a separate, independent corporate entity operating as an express company. It is not a railroad and is not governed by the Federal Employers' Liability Act. As was pointed out in *Erie Railroad Co. v. Margue, supra,* the service performed by the Express Agency is a special service which a railroad company is not legally bound to perform. Historically, this service has been delegated by the railroads of this country as is indicated by the opinions of the Interstate Commerce Commission in *Consolidation of Express Companies,* 59 I. C. C. 459; *Railway Express Agency, Inc., Securities and Control,* 150 I. C. C. 423, and *Railway Express Agency, Inc., Pooling Application,* 227 I. C. C. 517. There is nothing in the record in this case showing that the railroads have any right to control the Express Agency or its employees in the details of their work. Clearly the petitioner was an employee of the Railway Express Agency, Inc., alone and, therefore, not subject to the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX.

Memorandum Opinion.

(Filed August 9, 1949.)

FREED, *J.*:

There is no genuine issue raised as to any material fact. The plaintiff, an express messenger for Railway Express Agency, Inc., on duty aboard an express car forming part of a New York Central Railroad Co. train enroute from Cleveland to St. Louis, sustained injuries when he was struck by a Railway Express Agency truck as he was remounting the car at Terre Haute, Indiana. He brings suit under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, and the defendants, after answer, move for summary judgment.

At the hearing on the motion, defendants contended that an award of payments under the Indiana Workmen's Compensation Act was a bar to the present proceedings. *Chicago, R. I. & P. R. Co. v. Schendel,* 270 U. S. 611; *Landreth v. Wabash R. Co.,* 153 F. (2d) 98, cert. den. 328 U. S. 855. Cf. *Hoffman v. New York, N. H. & H. R. Co.,* 74 F. (2d) 227, cert. den. 294 U. S. 715. There is nothing before the Court to indicate the nature of the tribunal or the proceedings or the form of the award under which payments were made. However that may be, it is apparent further in this memorandum, that there is no occasion to decide this question.

Plaintiff contends that he is entitled to the benefits of the Federal Employers' Liability Act since Railway Express Agency, Inc., is a "common carrier by railroad" within the meaning of that Act by virtue of its structure and function and/or the broadened scope of the Act. If that is not true, then plaintiff maintains that the relationship between the two defendants, Railway Express and the New York Central Railroad, is some sort of agency or partnership, so that the plaintiff may be said to be an employee

of the Railroad and, as such, entitled to the benefits of the Act.

In respect of the first contention, whatever this Court's views might be were it presented for the first time, this Court is obliged to followed the precedent, established by the Supreme Court in *Wells-Fargo & Co. v. Taylor,* 254 U. S. 175, that an express company is not within the purview of the Federal Employers' Liability Act.

While counsel for plaintiff has, most instructively, illuminated the interrelationship of the railroads and the Railway Express Agency, Inc., not enough has been shown to by-pass the *Wells-Fargo* decision. The 1939 amendment to the Act opposes rather than aids plaintiff's contention; for Congress in broadening the coverage of the Act did not legislatively override the *Wells-Fargo* decision by specific wording, a step it did not hesitate to take in overruling a similar early construction of the Interstate Commerce Act.

Again, as to the second contention, plaintiff has not shown that the *Wells-Fargo* decision, *supra,* in which the same argument was made, is any the less controlling. See also: *Robinson v. Baltimore & Ohio R. R. Co.,* 237 U. S. 84. Even were this not true, this Court would be reluctant to point the way into the labyrinth of confusion that would result from what would essentially be a holding that every employee of Railway Express Agency, Inc., was also an employee of every railroad that had signed the agreement with Railway Express. It will suffice to say for the purpose of this decision that plaintiff was an employee of Railway Express Agency, Inc. and not an employee of New York Central Railroad.

Pursuant to an agreement reached at the time of the hearing on the motion for summary judgment the parties have stipulated that the Court might, if the issues discussed above were resolved in favor of plaintiff, make findings of fact on the issues of negligence and the extent of damages

on the basis of the record as it now exists. Since the decision is adverse to plaintiff, no findings on these issues has been made.

Motions of both defendants for summary judgment are granted.

FREED,
United States District Judge.

August 9, 1949.

Opinion of the Circuit Court.

Filed June 1, 1950.

No. 11039

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. JONES,

Appellant,

v.

NEW YORK CENTRAL RAILROAD COMPANY and RAILWAY EXPRESS AGENCY, INC.,

Appellee.

APPEAL from the District Court of the United States for the Northern District of Ohio, Eastern Division.

Decided June 1, 1950.

Before HICKS, Chief Judge; SIMONS and MILLER, Circuit Judges.

HICKS, Chief Judge. The gist of the complaint in this case is, that appellant, plaintiff below, an express messenger for appellee, Railway Express Agency, Inc. (herein called Express Agency), while on duty on an express car forming part of a New York Central Railroad Company train, en route from Cleveland to St. Louis, sustained injuries when struck by an Express Agency truck as he was re-mounting the car at Terre Haute, Indiana. He brought suit under the Employers Liability Act, 45 USC, Sec. 51, et seq. The case was tried to the court without the intervention of a jury and upon a stipulation of facts. Because of this stipulation the court concluded that there was no genuine issue raised as to any material facts, and obviously for this reason it did not make findings in accordance with Rule 52, Rules of Civil Procedure, as such findings were not required. See *Lucking v. Delano,* 122 Fed. (2d) 22 (C. A.

of D. C.); *Thomas v. Peyser,* 118 Fed. (2d) 369, 374 (C. A. of D. C.).

The parties are in agreement upon the questions here involved, i. e.,—

First, is the Express Agency a common carrier by railroad so as to be liable to its employees under the Employers Liability Act?

Second, when an employee of the Express Agency is injured while working on a railroad train, is he entitled to the benefits of the Act as an employee of that railroad?

The court answered both questions in the negative. It found in its memorandum opinion and in the judgment that appellee, the Express Agency, is not a "common carrier by railroad" and that therefore the Act is not applicable. It further found that appellant Jones was an employee of the Express Agency and not an employee of appellee Railroad Company.

We think the court was correct in both instances. The Federal Employers Liability Act, supra, provides:

> "Every *common carrier by railroad* while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . ." (Italics ours.)

In *Wells Fargo & Co. v. Taylor,* 254 U. S., 175, 187, the court said:

> "In our opinion the words 'common carrier by railroad' as used in the act, mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention

of cars, engines, track, roadbed and other property pertaining to a going railroad (see *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 212-213); by the obvious reference in the latter part of §§ 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employees (see *San Antonio & Aransas Pass Ry. Co. v. Wagner,* 241 U. S. 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads *but not express companies doing business as here shown.* 1 I. C. C. 349; *United States v. Morsman,* 42 Fed. Rep. 448; *Southern Indiana Express Co. v. United States Express Co.,* 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see *American Express Co. v. United States,* 212 U. S. 522, 531, 534."

See also *Chicago Refrig. Co. v. Interstate Commerce Comm'n.,* 265 U. S. 292.

The *Wells Fargo* case was not a suit for damages but it did announce an interpretation of the Act upon the question here involved. We find nothing in the record sufficient to differentiate the Express Agency from Wells Fargo & Company or to place it in a separate category. It was a New Jersey corporation organized to carry the express transportation business of various railroad companies and other carriers. It is undoubtedly true that the Express Agency is a common carrier and as such is subject to all the duties and responsibilities of a common carrier at common law but it is not a common carrier by railroad. The Act was passed in 1908 and the *Wells Fargo* case was decided in 1919. The Act was amended in 1939 but no effort was then made to include express companies within its terms. We are therefore justified in concluding that the *Wells Fargo* case had legislative approval. *United States v. Elgin J. & E. Ry.,* 298 U. S. 492, 500.

The answer to the second question is found in *Robinson v. Baltimore & Ohio RR Co.*, 237 U. S. 84, 94, in which the court said:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

The appellant, Robinson, had brought suit under the Act for damages alleged to have been received by him while on appellee's train as a porter, employed by the Pullman Company. To treat Jones, a messenger for the Express Agency, as an employee of appellee Railroad Company, which did not employ him, would be in effect to disregard the separate legal entity of that corporation. There is no showing of special circumstances to justify such a result.

In *Gaulden v. Southern Pacific Co.*, 78 Fed. Supp., 651, 656, it was held that a contract between railroads and a refrigerator company for servicing refrigerator cars rented to railroads did not make the railroads employers of the refrigerator company's employee so as to subject the railroad company to suit by Gaulden, the employee, under the Act. The case was affirmed by the Court of Appeals of the Ninth Circuit [174 Fed. (2d) 1022] upon the grounds and for the reasons stated in the opinion of the trial court.

In *M. K. & T. Ry. Co. v. Blalack, et al.*, 105 Texas 296, it was held that an express messenger whose duty it was to accompany and care for express matter on the train of a railroad company was not an employee of the railway company. This was held on the authority of *Gulf C. & S. F. Ry. Co. v. Wilson*, 79 Texas 375.

The judgment appealed from is affirmed.